

QUESTIONS PRESENTED

- I. Whether Employer and Insurer's defense of judicial estoppel is precluded when no claim for post-August 2002 benefits was ever judicially accepted.**

The Department found that Ron's current South Dakota claim is not judicially estopped because his Wyoming benefits were paid only for his pre-August 2002 condition and treatment, a claim for which he has NOT asked the South Dakota Employer to pay. Additionally, the Department found that no claim for post-August 2002 benefits was ever judicially accepted. The circuit court reversed, concluding, as a matter of law, that Ron was judicially estopped from making his current claim in South Dakota. In doing so, however, the circuit court did not conclude that any of the findings of fact from the Department were clearly erroneous.

Authority: Watertown Concrete Products, Inc. v. Foster, 2001 SD 79, 630 NW2d 108; Williams v. Boeing Co., 517 F3d 1120 (9thCir 2008).

- II. Whether the Department erred by admitting subjective documents, including argument of counsel in Claimant's Wyoming workers compensation file, and whether the circuit court placed undue emphasis on those documents, particularly in light of the Department's Findings of Fact made from the more reliable, objective medical evidence.**

The circuit court affirmed the Department's ruling that the Wyoming workers compensation file, including argument of counsel, was both admissible and relevant in the instant case.

Authority: SDCL 19-6-3; SDCL 19-10-2; SDCL 19-10-4; SDCL 19-12-3; SDCL 19-16-1; SDCL 19-16-8.2; SDCL 19-18-2; People ex rel. L.S., 2006 SD 76, 721 NW2d 83; Schoon v. Looby, 2003 SD 123, 670 NW2d 885; State v. Smith, 1993 SD 83, 599 NW2d 344.

- III. Whether Ron was entitled to reopen his claim for permanent total disability when that right was preserved in the settlement agreement and the extent of deterioration was unpredictable and unknown to him at the time he signed.**

The Department rejected Employer and Insurer's waiver defense and found that Ron specifically reserved the right to reopen his case, both for medical expenses and permanent total disability. The circuit court did not reach this issue.

Authority: SDCL 62-7-33; Kasuske v. Farwell, Ozmun, Kirk & Co., 2006 SD 14, 710 NW2d 451; Sopko v. C&R Transfer Co., Inc.,

1998 SD 8, 575 NW2d 22; *Mills v. Spink Electric Co-op*, 442 NW2d 243 (SD 1989); *Novak v. Grossenburg and Son*, 89 SD 308, 232 NW2d 463 (SD 1975).

IV. Whether the circuit court was wrong in failing to address the Department's improper consideration of collateral source payments offered for no other reason than to reduce Ron Bonnet's damages.

Ron appealed the Department's admission of collateral source payments offered only for the purpose of reducing his damages. Employer and Insurer contended that the collateral source rule does not apply in workers compensation cases. The circuit court did not reach this issue.

Authority: SDCL 53-2-6; SDCL 62-1-1.3; SDCL 62-4-1; Masad v. Weber, 2009 SD 80, 772 NW2d 144; *Cruz v. Groth*, 2009 SD 19, 763 NW2d 810; *Papke v. Harbert*, 2007 SD 87, 738 NW2d 510; *Cozine v. Midwest Coast Transp.*, 454 NW2d 548 (SD 1990); *Arcon Constr. Co. v. South Dakota Cement Plant*, 412 NW2d 876 (SD 1987); *Mullen v. Lehman Trikes USA, Inc.*, Civ. 08-55, Hughes County, Sixth Judicial Circuit (2008).

STATEMENT OF THE ISSUES

- 1. The Circuit Court's determination that Bonnet is judicially estopped from pursuing his claim for benefits in South Dakota was correct.**

The Circuit Court held that Bonnet is judicially estopped from seeking benefits in South Dakota given his prior claim for benefits in Wyoming.

- *New Hampshire v. Maine*, 532 U.S. 742 (2001)
- *Canyon Lake Park, L.L.C. v. Loftus Dental, P.C.*, 2005 S.D. 82, 700 N.W.2d 729

- 2. Evidence from Bonnet's Wyoming worker's compensation file was properly admitted.**

The Circuit Court held that evidence from Bonnet's Wyoming worker's compensation file was properly admitted, including argument of counsel, holding that the documents were not hearsay, duplicative, or ambiguous.

- *State v. Mattson*, 2005 S.D. 71, ¶ 20, 698 N.W.2d 538
- *Rosen's Inc. v. Juhnke*, 513 N.W.2d 575 (S.D. 1994)
- SDCL § 19-16-12

- 3. The DOLR correctly admitted evidence of payments made by third parties under SDCL § 62-1-1.3.**

The DOLR held that the collateral source rule does not apply to worker's compensation cases to the extent that it conflicts with the clear language of SDCL § 62-1-1.3. Therefore, the DOLR allowed evidence of payments made by third parties to determine the extent, if any, to which Bonnet was entitled to reimbursement pursuant to SDCL § 62-1-1.3. The Circuit Court did not reach this issue.

- *Jackson v. Lee's Travelers Lodge, Inc.*, 1997 S.D. 63, 563 N.W.2d 858
- SDCL 62-1-1.3

- 4. The terms of the 1987 settlement agreement between Bonnet, Employer, and Insurer, bar Bonnet's claims for benefits in this case.**

The DOLR held that the terms of the 1987 settlement agreement allowed Bonnet to reopen his case. The Circuit Court did not reach this issue.

- *Sopko v. C & R Transfer Co., Inc.*, 1998 S.D. 8, 575 N.W.2d 225
- SDCL § 62-7-33

5. The DOLR erred by relying upon the Last Injurious Exposure Rule to assign liability.

Rather than applying SDCL § 62-7-33, the DOLR applied the Last Injurious Exposure Rule and found that Bonnet met his burden of proof by showing that his South Dakota fall was a major contributing cause of his current lower back condition, and his Wyoming injury was not independently linked to that condition. The Circuit Court did not reach this issue.

- *Kasuske v. Farwell, Ozmun, Kirk & Co.*, 2006 S.D. 14, 710 N.W.2d 451
- *Sopko v. C & R Transfer Co., Inc.*, 1998 S.D. 8, 575 N.W.2d 225
- SDCL § 62-7-33

6. Bonnet is foreclosed from payment of medical expenses pursuant to SDCL § 62-4-1 (1973).

The DOLR held that SDCL § 62-4-1 (1973) does not prevent Bonnet from seeking payment for medical expenses. The Circuit Court did not reach this issue.

- *Sopko v. C & R Transfer Co., Inc.*, 1998 S.D. 8, 575 N.W.2d 225
- SDCL § 62-4-1 (1973)

7. The DOLR exceeded the terms of the Pre-hearing Order by awarding benefits.

The Pre-hearing Order issued by the DOLR did not contemplate a specific award of benefits, but the DOLR's decision included a specific award of benefits as part of the Order. The Circuit Court did not reach this issue.

- *Gul v. Center for Family Medicine*, 2009 S.D. 12, 726 N.W.2d 629
- *In re Rice*, 42 Bankruptcy Rptr. 838 (D.S.D. 1984)
- *Lagge v. Corsica Co-Op*, 2004 S.D. 32, 677 N.W.2d 569